Supreme Court of the United States

October Term, 1950.

No. 275...

Supreme Court, U. S.
FILED
AUG 28 1950
CHARLES ELMORE CROPLEY
CLERK

ARTHUR BROWN, suing in his own behalf and as stockholder of Eastern States Corporation, and in behalf of all other stockholders of said Corporation similarly situated,

Petitioner,

against

EASTERN STATES CORPORATION, a body corporate of the State of Maryland, and officers and directors: Floyd L. Carlisle, Jr., W. K. Dick, A. J. Eckert, R. K. Ferguson, R. B. Maltby, W. D. Moran, James W. Moss, Charles Plohn, Clifford Roberts, W. H. Versfelt, T. J. Walsh, and G. W. Wattles; and also Horace R. Lamb.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, and Brief in Support Thereof.

Validity of removal in first instance by U. S. District Court from Maryland state court under 28 U. S. C. §1441. Error of holding that original complaint on which removal based raised substantial federal question. Error of holding denying remand to Maryland state court under 28 U. S. C. §1447(c), upon filing of amended bill of complaint, pursuant to leave granted by Court, eliminating before answer filed every last trace of alleged federal question, diversity of citizenship being also absent. Holding of Court below works illegal and unconstitutional result of permitting federal courts to retain jurisdiction where sole basis of removal was claimed existence of alleged federal question, not substantial, and even that alleged federal question was dropped from case by amendment of complaint, leaving in case, before issue joined, solely questions of state law.

Dated, August 24, 1950.

DAVID I. SHIVITZ,
Counsel for Petitioner,
270 Madison Avenue,
New York 16, New York.

EDMUND B. HENNEFELD,
Of Counsel.

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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—o—

Notice of Filing.

To Horace R. Lamb and George Cochran Doub (Marshall, Carey, Doub & Mundy, and Le Boeuf & Lamb), Esqs., Counsel for Respondents:

YOU ARE HEREBY NOTIFIED that a petition for a writ of certiorari in the above-entitled cause was filed in the Supreme Court of the United States on the 25th day of August, 1950.

A printed copy of the proceedings in the United States Court of Appeals for the Fourth Circuit and a printed copy of the petition and brief are served upon you herewith.

DAVID I. SHIVITZ,
Counsel for Petitioner,
270 Madison Avenue,
New York 16, N. Y.

EDMUND B. HENNEFELD,
Of Counsel.

Service of the above accepted this 25th day of August, 1950.

HORACE R. LAMB, ESQ.,
Le Boeuf & Lamb,
Counsel for Respondents,
15 Broad Street,
New York, New York.

GEORGE COCHRAN DOUB, ESQ.,
Marshall, Carey, Doub & Mundy,
Counsel for Respondents,
First National Bank Bldg.,
Baltimore, Maryland.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

To the Honorable the Supreme Court of the United States:

The petition of Arthur Brown, suing in his own behalf and as stockholder of Eastern States Corporation, and in behalf of all other stockholders of said Corporation similarly situated, respectfully shows:

1. This petition seeks review of a decision of the United States Court of Appeals for the Fourth Circuit, affirming the decision of the United States District Court

for the District of Maryland at Baltimore, which dismissed a suit instituted by petitioner, as holder of preferred and common stock of respondent, Eastern States Corporation, a Maryland corporation, to enjoin the carrying out by the latter company of a plan of corporate reorganization claimed to be illegal and fraudulent.

2. The action was commenced on September 9, 1949, by original bill of complaint filed in the state court, Circuit Court No. 2 of Baltimore City, by petitioner, Arthur Brown, suing in his own behalf and on behalf of all other stockholders of respondent, Eastern States Corporation, similarly situated. It sought as against the respondent corporation and all its officers and directors (1) injunctive relief, enjoining the plan charged to be illegal and fraudulent, (2) an accounting by the respondents for waste of assets committed by them in connection with the assertedly illegal and fraudulent plan, and (3) such additional and ancillary relief as the nature of the case warranted.

3. Acting on this original bill of complaint filed, the Maryland state court (Sherbow, *J.*), granted *ex parte* an order dated September 9, 1949, enjoining all the defendants from proceeding with the plan of reorganization until further order of the Court, but meanwhile authorizing the defendants to apply to the Court for immediate hearing. The defendant corporation, however, instead of applying to the State Court to dissolve the restraining order, petitioned the United States District Court for the District of Maryland for removal. In its petition, the defendant corporation stated:

> "Removal jurisdiction of this Honorable Court is founded on the existence of Federal questions, this civil proceeding involving questions arising under the laws of the United States, etc."

4. No other ground of removal was claimed then, or in fact has since been or can be claimed.

5. On September 12, 1949, pursuant to application of the defendant corporation, an order was granted *ex parte* by the United States District Court for the District of Maryland, at Baltimore (COLEMAN, *D. J.*), removing the case to that Court.

6. On September 16, 1949, the same District Court granted an order requiring the petitioner, as condition of continuing the temporary restraining order granted by the Maryland state court, to post a bond of $200,000. Petitioner's efforts, on motion, to have the District Court remand the case to the state court or reduce the amount of the bond were unavailing.

7. Thereafter, on September 19, 1949, before answer filed by the respondents, petitioner moved to renew his earlier motion to remand to the Maryland state court for lack of a substantial federal question. In this connection, petitioner's counsel made statement in open court to the District Judge in response to specific query by the latter that no relief would be claimed or pressed by the petitioner under any provision of federal law whatsoever. Petitioner's counsel further stated then and there that petitioner was withdrawing such allegation of the bill of complaint as might be alleged or claimed to refer to any violation of federal law, petitioner being desirous and content, thenceforth, to stand solely and exclusively on the claimed violations of Maryland state law.

8. In further pursuance of this withdrawal of alleged claim based on federal law, and on September 19, 1949, which was still before answer filed by any of the defendants, petitioner moved to amend his bill of complaint by deleting and omitting each and every allegation, without

exception, having claimed reference to federal law, leaving in the case as the sole, legal basis for the wrongs complained of, the claimed violations of Maryland state law. Such motion for leave to amend was duly granted by the District Court by order dated September 26, 1949.

9. Notwithstanding this decision granting leave and the filing of an amended bill of complaint pursuant thereto, still before answer filed, deleting each and every allegation having connection, remote or otherwise, with federal law, the District Court again denied petitioner's motion to remand. Thus, the self-same order of the Court provided:

> "Ordered, that the Petition of Plaintiff for leave to file an amended complaint be and it hereby is granted and the motion of Plaintiff to remand to the Circuit Court No. 2 of Baltimore City be and it is hereby denied."

10. Subsequent to this denial of petitioner's motion to remand, a hearing was held on the limited subject of petitioner's right to a preliminary injunction. At the close of this hearing, not only was the motion for such temporary injunction denied, but the action was itself dismissed, the District Court granting the order dated October 7, 1949, one of the orders appealed from.

Jurisdiction and Timeliness.

11. The within petition for certiorari is made under 28 U. S. C., Section 1254 (1). The Court has jurisdiction to grant the writ.

Brooklyn Sav. Bank v. *O'Neil,* 324 U. S. 697, 715 (1945), cert. gr. in No. 421 at 323 U. S. 698;

Otis & Co. v. *Securities and Exchange Commission,* 323 U. S. 624 (1945), cert. gr. at 322 U. S. 724.

12. A final order and judgment were entered in the office of the Clerk of the U. S. Court of Appeals for the Fourth Circuit on April 4, 1950. Thereafter, and on June 28, 1950, an order was granted by this Honorable Court (VINSON, *Ch. J.*), extending petitioner's time to file petition for writ of certiorari to August 31, 1950 (Proc. in U. S. Circ. Ct., p. 346, fol. 368).

13. The United States Court of Appeals for the Fourth Circuit held that the case was properly removed to the District Court in the first instance on the ground that the original bill of complaint raised a substantial federal question. The same Court held further that despite amendment of the bill of complaint, pursuant to leave granted by the Court and before answer filed, eliminating from the case every possible reference to claimed rights under federal law, and in the absence of any alleged diversity of citizenship, remand to the state court was nevertheless properly refused in the light of the provisions of new 28 U. S. C., Section 1447 (c). That this was the situation is made clear in the Circuit Court's own opening paragraph of its opinion, viz.:

> "The court (*i. e.*, District Court) declined to remand the case to the state court after the complaint had been amended to eliminate all reference to rights under federal statutes, etc."

The Statutes, the Interpretation and Constitutionality of Which Are Involved.

14. The statutes, the interpretation and constitutionality of which are involved, are 28 U. S. C., Section 1441 and 28 U. S. C., Section 1447 (c). The provisions of these sections are printed as part of Appendix A.

Opinions Below.

15. The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 181 F. 2d 26. It is printed here as Appendix B. There is no report of the opinion of the District Court which was oral.

Summary Statement of the Matter Involved.

16. The action as originally instituted was not one of which the United States District Court would have had original jurisdiction, and not one "founded on a claim or right arising under the Constitution, treaties or laws of the United States," as provided in 28 U. S. C., Section 1441. If the section in question be so interpreted as applied to the facts at bar, it is itself violative of Article III, Section 2, of the Constitution of the United States. On this ground, the case should not have been removed to the District Court in the first instance. Assuming, however, any power in the Court whatever to effect the removal, the case should not have been removed as a matter of discretion.

17. Whatever the situation based on the original bill of complaint, however, upon filing of an amended complaint, pursuant to leave granted by the District Court and before answer filed, eliminating from the case every last, possible claim or trace of alleged federal question, diversity of citizenship also being absent, the case was required by 28 U. S. C. Section 1447(c) to be remanded by the United States District Court to the Maryland state court from which it had been removed. If that section be construed on the facts at bar to provide that the case did not have to be so remanded, then, as so construed, it was itself violative of Article III, Section 2, of the Constitution of the United States. Assuming, without conceding,

moreover, the power in the Court to refuse remand as a matter of right, it was error, on the facts at bar, to refuse remand as a matter of discretion.

Questions Presented.

18. The questions presented in this case are, the following:

(a) Was the action properly removed to the District Court in the first instance (either as a matter of right or of discretion), based on the original bill of complaint as filed?

(b) Should the case have been thereafter remanded by the District Court (either as a matter of right or of discretion), upon filing of an amended bill of complaint, pursuant to leave granted by the District Court and before any answer filed, eliminating from the case every last vestige and trace of alleged federal question?

Assignment of Errors.

19. It is submitted that the United States Court of Appeals for the Fourth Circuit erred:

(a) In holding that the case was properly removed to the District Court in the first instance.

(b) In holding that remand to the state court, after filing of the amended bill of complaint eliminating any claimed federal question, was properly refused.

(c) In affirming the order of the United States District Court dismissing the suit on the merits without affording petitioner an actual trial or hearing on the merits.

Reasons for Allowance of the Writ.

20. The reasons relied on by petitioner for allowance of the writ are, as follows:

(a) The Circuit Court of Appeals has decided a novel and fundamental question of federal, statutory and constitutional law which has not been, but should be, settled by this Honorable Court. That question, one of first impression arising under the new Judiciary Code, is whether under new 28 U .S. C., Section 1447(c), a case is required to be remanded, either as a matter of right or discretion, where there is no diversity of citizenship and the original bill of complaint has been amended, before answer filed, to eliminate every last trace of claimed federal question. This case affects the interpretation and validity of a new section of the Judiciary Code, one of basic importance, moreover, in marking and delimiting the jurisdiction of the courts of the United States throughout the country in situations both of removal and remand. It would appear that no decision by any court other than the instant one has yet been handed down interpreting (and passing upon the constitutional validity, as so interpreted), of the vital new amendments to the Judiciary Code in question. The decisions of the courts below, if upheld on these jurisdictional questions, will plunge the whole matter of the jurisdiction of the United States courts on removal and remand into obscurity and confusion, inviting criticism, moreover, of the latter courts for reaching out in exercise of their jurisdiction beyond the limits provided and set by the Constitution of the United States.

(b) The Circuit Court of Appeals has decided an important federal question in a way probably in conflict with applicable decisions of this Court.

Under the federal Investment Company Act of 1940, referred to in the original bill of complaint, no cause or right of action was invested in petitioner, as mere stockholder in the respondent corporation. Such cause or right of action was invested, by terms of the Act, only in the Securities and Exchange Commisison itself. However, despite the fact that the original bill of complaint made reference to an alleged federal question, that alleged federal question was not a substantial one since no cause or right of action in the plaintiff could be claimed thereunder, and no right, therefore, to maintain the present suit based thereon. In the absence of such substantial federal question, there was no basis for *original* jurisdiction of the controversy in the District Court, and removal to that Court should hence have been refused.

Ramapo Water Co. v. *New York,* 236 U. S. 579 1915).

(c) The Circuit Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings by a lower court as to call for an exercise of this Court's power of supervision. This petitioner commenced its suit in the state court, obtaining a temporary restraining order pending hearing on an application for preliminary injunction. Thereafter, the case was removed to the District Court without proper warrant, an excessive requirement of a $200,000 bond imposed as condition of continuance of the temporary restraining order, and remand refused when every last trace and vestige of claimed federal question was eliminated from the case. Thereafter, a purely preliminary hearing was held on petitioner's application for a temporary injunction. On close of such preliminary hearing, and without trial or hearing on the merits whatsoever, the case was

dismissed. The illegality and fraudulent character of the defendant corporation's plan of reorganization under Maryland state law stands revealed on its face, and, more particularly, as that plan is analyzed and examined in the opinion of the Circuit Court (see, *e. g.*, excerpt quoted below). The petitioner is in the situation, therefore, in a case involving substantive questions purely of state law and none at all of federal law, of having had the federal courts first oust the Maryland state court of its rightful jurisdiction, then impose onerous, unwarranted and arbitrary conditions of continuing a temporary restraining order, then refuse remand to the proper jurisdiction to adjudicate and dispose of the issues of state law only, and then, finally, deny petitioner his day in court without trial or hearing on the merits whatsoever. Such departure from the accepted and usual course of judicial proceeding, if not corrected, is not one calculated to invite confidence in courts.

All the above has occurred, morever, in a case where the merits are so completely in petitioner's favor under the Maryland state law itself, as all but acknowledged by the Circuit Court of Appeals in its opinion, as follows (See, Appendix B, pp. 36-37):

> "With respect to the charge that the plan was unfair, however, it is no sufficient answer that its acceptance was a voluntary matter on the part of the stockholder consenting to an exchange thereunder. * * * it can be well argued that it was an abuse of power on the part of the directors to put out a plan the effect of which, if accepted by all the preferred stockholders except the president, would give them approximately $10 per share less than the asset value of their stock and would result in a gain to him of more than eight hundred thousand dollars.

The president and directors occupied a fiduciary relationship toward the stockholders; and for them to put forward a plan under which the assets of the corporation would be used in the purchase of stock in a way which would so greatly profit one of their number, would be difficult to justify under any principles of law or equity with which we are familiar. See *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 599.

"We think, also, that there was grave question as to whether the plan, not having been approved by the stockholders, was valid under the corporation law of Maryland. It involved, not an ordinary purchase of stock for redemption, as allowed by article 23, section 54(2), or an ordinary dealing by the corporation in its own stock, as provided for by article 23, section 54(8), but, if carried out as contemplated, a sale to its preferred stockholders of more than three-fourths of its assets and the retirement of 94% of its preferred stock, with a corresponding reduction of capital. It would have changed basically the nature and the holdings of the corporation; and the general rule is that such a basic change to be valid must have the approval of the stockholders in conformity with the statutes of the state of incorporation. See 13 Am. Jur. sec. 196, p. 315; 18 C. J. S. 747; note 44 A. L. R. 16. The sections of the Maryland Code authorizing the corporation to deal in its own stock or to purchase and retire shares subject to redemption, must be construed in the light of this well settled rule of corporation law, and cannot reasonably be given an interpretation which would validate a basic change in corporate structure without the consent of the stockholders. Particularly is this true in view of the provisions of section 32 of article 23 of the Code which requires the consent of stockholders to the

reduction of capital stock and section 38 of article 23 which requires the approval of two-thirds of the stockholders where all or substantially all of the assets are sold, with provision for adequate protection of dissenting stockholders. * * * "

WHEREFORE, petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Fourth Circuit, commanding that Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Court in this cause, to the end that the case may be reviewed in this Court, as provided in 28 U. S. C., Section 1254(1); and that the final judgment of the said Court, and every part thereof, may be reviewed and corrected by this Court in conformity with the Constitution and Laws of the United States; and that the said final judgment dismissing the action may be reversed and the case remanded to the Circuit Court No. 2 at Baltimore City for full disposition and determination on the merits there in accordance with state law; and petitioner prays for such other and further relief as to this Court may seem just and proper; and petitioner will ever pray.

Dated, New York, N. Y., August 24, 1950.

ARTHUR BROWN, suing in his own behalf and as stockholder of Eastern States Corporation, and in behalf of all other stockholders of said Corporation similarly situated,

Petitioner,

by DAVID I. SHIVITZ,
Counsel for Petitioner,
270 Madison Avenue,
New York 16, New York.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Statement of the Case.

This action was commenced by bill of complaint in the Circuit Court No. 2 of Baltimore City, by Arthur Brown, plaintiff, suing in his own behalf and in behalf of all other stockholders of the defendant, Eastern States Corporation, a Maryland corporation, similarly situated. It was brought against the defendant corporation and all its officers and sought (1) injunctive relief, (2) an accounting

by the defendants for waste, and (3) such additional, ancillary relief as the facts and nature of the case warranted.

The original bill of complaint (Appellant's Appendix, pp. 1a-18a), alleged that the plaintiff, Arthur Brown, was a stockholder in the defendant corporation owning common and preferred stock having a value of over $25,000 (par. 1); that the defendant corporation was an investment company, duly registered under the Investment Company Act of 1940, its sole business being the holding for investment of the shares of other corporations (par. 3); that subsequent to June 30, 1949, the defendant corporation disposed of its other holdings by sale leaving as its sole assets apart from cash the common stock of a single corporation, to wit, the St. Regis Paper Company, a New York corporation (par. 3); that on or about August 30, 1949, the date of the letter of plan hereafter referred to, the distribution of stock of the defendant corporation was, as follows: issued and outstanding, 572,132 shares of common stock and 100,000 shares of preferred stock, the latter divided up into the two classes of Series A $7 Dividend Preferred Stock of which there were 40,000 shares, and Series B $6 Dividend Preferred Stock, of which there were 60,000 shares (par. 4); that the said shares of Preferred Stock were, and had been for some years in arrears of accumulated dividends so that at the time set forth the aggregate 100,000 shares of Preferred Stock were entitled to a preference in voluntary or involuntary litigation totalling $20,363,432, representing $10,000,000 of stated value and $10,363,432 in accumulated dividend arrearages as of December 31, 1948, and June 30, 1949 (par. 4).

The bill of complaint further alleged that against this $20,363,432 of liability to the Preferred Stock shareholders, the defendant corporation had as its sole assets cash somewhat in excess of $457,000, and 1,000,000 shares of the common stock of the St. Regis company referred to (par. 5); that the 1,000,000 shares in question represented 19.3% of the total common stock issued and outstanding

of the latter company and, therefore, as a practical matter, the controlling stock interest in that company (par. 5); that according to representations made by the defendants in the letter of plan hereafter referred to, the value of the 1,000,000 shares at the time of the plan was $6.75 a share, or a total of $6,750,000 (par. 5); that, moreover, since the 1,000,000 shares constituted 19.3% of the total shares of the St. Regis Company, the total value of the shares of that company was approximately $35,000,000 (par. 5); that the said St. Regis Company, with all its various affiliated subsidiaries, constituted a vast industrial empire (par. 5); and that the defendant, R. K. Ferguson, the president of, and largest stockholder in the defendant corporation, and the prime moving spirit in the conspiracy alleged and referred to, was also the President, Director, member of the Executive Committee, and stockholder with large stock interest in the St. Regis Company, besides being also a high-salaried official in that company (par. 5).

The bill of complaint went on further to allege that the 1,000,000 shares of the St. Regis Company held by the defendant corporation had been acquired by it in earlier years at a cost of approximately $18 a share, or a total cost of approximately $18,000,000 (par. 6); that on the basis, therefore, of the present market price of $6,750,000 asserted by the defendant corporation in its letter of plan to be referred to, the defendant corporation had already suffered a capital loss in excess of $11,000,000 which, in the hands of such an investment company, could be profitably utilized as an offset against taxable capital gains in the ensuing period, and thus constituted a distinctly valuable right or interest in its hands (par. 6).

The bill of complaint further went on to allege that on or about August 30, 1949, the defendant corporation, acting through its president, the defendant, Ferguson, and by order of the other defendants who were its directors, issued and circulated among all the holders of the 100,000

shares of Preferred Stock, a letter of plan dated on that date, a copy of the letter of plan being attached to the bill of complaint as Exhibit 1 (par. 7); that the letter of plan in question stated that in response to alleged "numerous requests" made to the defendant corporation by its preferred shareholders, the Board of Directors had determined to extend to all such holders the opportunity to submit at any time before September 30, 1949, tenders of their shares of Preferred Stock for shares of the common stock of the St. Regis Company held by the defendant corporation, plus additional cash to be paid them, the exact basis of exchange being, for the Series A Preferred stock 9 shares of the St. Regis common (@ $6.75 = $60.75), plus cash of $4.79 a total of $65.54, and slightly less but on a comparable basis for the Series B Preferred (par. 8).

The bill of complaint went on to allege that the effect of the proposed exchanges in question, as stated by the defendant corporation in the letter of plan, was that, assuming the holders of 100% of the Preferred shares availed themselves of the exchange, they would receive in the aggregate 860,000 of the 1,000,000 shares of the St. Regis Company held by the defendant corporation, plus a total of approximately $457,000 in cash, substantially exhausting the cash on hand of the defendant corporation and leaving remaining with that corporation only 140,000 shares of the St. Regis common stock; and that the further effect of said proposed exchanges was stated by the defendants in the letter of plan to be, as follows:

> "Upon such exchange the holders of the Series A and Series B Preferred Stocks, as a class, would receive a participation equal to approximately 87% of the total net assets of the Corporation, and there would remain for the holders of the presently outstanding shares of Common Stock, as a class, a participation equal to approximately 13% of the total net assets of the Corporation" (par. 10).

The bill of complaint further alleged that included in the letter of plan was the statement that the defendant, Ferguson, who was himself the owner of approximately 6% of the Preferred shares, intended not to offer his own shares for exchange under the plan (par. 11).

The bill of complaint further alleged that the decision to promote the plan in question was adopted by the defendant directors without prior calling of a meeting of the stockholders of any class, and without prior meeting, approval, vote or consent by the stockholders whatsoever (par. 12); and that such decision without prior action or approval of stockholders was in clear violation of the provisions of Section 38(a) of Article 23 of the Code of Public General Laws of Maryland in that the plan accomplished in effect a sale, exchange or transfer of substantially all the assets of the defendant corporation, to wit, 87% thereof (par. 13).

The bill of complaint went on further to allege the defendant corporation's sub-classification in its registration under the federal Investment Company Act of 1940 as a "non-diversified" management company (par. 14), the defendant corporation's amendment of its registration certificate under that Act to change its sub-classification to that of a "diversified" company, and the statement in that amendment of its fundamental policy to continue to invest its funds in the securities of other corporations (par. 15); that the proposed exchange plan was in contravention of this amendment of its registration in that it was tantamount to a liquidation, as opposed to continued investment in the securities of other corporations, and that the proposed exchange plan was, therefore, in violation of the federal Investment Company Act as well (par. 16).

Still further, the bill of complaint alleged that the plan was also in clear fraud of the rights of the stockholders, preferred and common, all pursuant to a conspiracy on the part of the defendants to cheat and defraud those same stockholders (par. 17); that the plan was de-

liberately not submitted to the stockholders for approval for the reason that it could not bear analysis or scrutiny by them (par. 18); that facts had been withheld by the defendants vital to a proper consideration by the preferred shareholders of the plan on its merits (par. 18); and that the net effect of the plan going through as proposed would be to benefit the defendant, Ferguson, himself personally to the extent of approximately $140 a share ($203 less $65), for each of the 6,000 shares held by him, or a total of over $800,000 (par. 19); that in addition, the block value of the 1,000,000 shares of St. Regis common would thereby be dissipated and lost, to the consequent loss and damage to all classes of the defendant corporation's stockholders, preferred and common, but to the direct, personal benefit of the defendant, Ferguson, for reasons further set forth and analyzed and explained in detail in paragraphs 19, 20, 21, 22 and 23 of the bill of complaint.

The original bill of complaint concluded its allegations by praying for the following forms of equitable relief (Appellant's Appendix, pp. 17a-18a):

1. injunction of the plan;
2. an accounting for waste of assets suffered or permitted to be suffered in connection with the plan; and
3. any necessary ancillary relief, "as the nature of his (plaintiff's) case may require."

Acting on this bill of complaint, the Circuit Court No. 2 of Baltimore City (Sherbow, *J.*), granted *ex parte* an order dated September 9, 1949, enjoining the defendants from proceeding with the plan until further order of the Court, but authorizing the defendants to apply to the court for immediate hearing (Appellant's Appendix, p. 34a).

The defendant corporation, however, instead of applying to the state court to dissolve the preliminary restraining order, petitioned the United States District Court for the District of Maryland for removal. In its petition, the defendant corporation stated (Appellant's Appendix, p. 51a):

> "Removal jurisdiction of this Honorable Court is founded on the existence of Federal questions, this civil proceeding involving questions arising under the laws of the United States, pursuant to Title 28, sections 1331 and 1441 et seq. of the United States code."

No other ground of removal whatever was claimed then, or in fact has since been or can be claimed.

On September 12, 1949, an order was granted *ex parte* by the United States Court (Coleman, *D. J.*), removing the case to the District Court.

On September 16, 1949, the District Court granted an order requiring the plaintiff, as condition of continuing the preliminary restraining order granted by the state court, to post a bond of $200,000. Plaintiff's efforts to have the Court remand to the state court or reduce the amount of the bond were unavailing (Appellant's Appendix, p. 54a).

Thereafter, on September 19, 1949, before answer filed by the defendants, plaintiff moved to renew his earlier motion to remand to the state court for lack of a substantial federal question (Appellant's Appendix, p. 71a). In this connection, plaintiff's counsel made statement in open court to the District Judge that no relief was being thenceforth claimed by the plaintiff, or in any manner pressed, under the federal Investment Company Act of 1940, or any other provision of federal law (Appellant's Appendix, pp. 124a-125a). Plaintiff's counsel stated that plaintiff was withdrawing such allegations of the bill of com-

plaint as referred to any claimed violation of federal law, plaintiff being content to stand solely on claimed violations of the Maryland state law (Appellant's Appendix, pp. 124a-125a).

In further pursuance of this withdrawal of complaint based on federal law, and on September 19, 1949, which was still before answer filed (Appellant's Appendix, p. 87a), plaintiff moved to amend his bill of complaint by dropping every allegation without exception having reference to federal law, leaving in the case as the sole, legal basis for the wrongs complained of, violation of Maryland state law (Appellant's Appendix, p. 87a). This motion was granted by the District Court by order dated September 26, 1949 (Appellant's Appendix, p. 87a). Notwithstanding this decision and the filing of an amended bill of complaint deleting every allegation having any connection, remote or otherwise, with the federal law, the District Court nevertheless denied plaintiff's motion to remand. Thus, the self-same order of the Court provided (Appellant's Appendix, p. 87a):

> "Ordered, that the Petition of Plaintiff for leave to file an amended complaint be and it hereby is granted and the motion of Plaintiff to remand to the Circuit Court No. 2 of Baltimore City be and it is hereby denied."

Subsequent to this denial of plaintiff's motion to remand, a hearing was held on the subject of plaintiff's right to a temporary injunction (Appellant's Appendix, pp. 87a-89a). At the close of this hearing, the action was dismissed, resulting in the order dated October 7, 1949, one of the orders appealed from (Appellant's Appendix, p. 92a).

Jurisdictional Statement and Assignment of Errors.

The Court will find these at pages 4-5 and 7 of the petition, *supra.*

POINT I.

The original bill of complaint did not raise a substantial federal question. Hence, the original removal to the District Court was improper and not authorized by 28 U. S. C. Section 1441(b), or Article III, Section 2, of the Constitution.

The original bill of complaint herein did not raise a *substantial* federal question. This was because while Section 80a of the Investment Company Act of 1940 was referred to in that complaint, no right of action was invested by that Act in a stockholder to bring suit thereunder, but only in the Securities and Exchange Commission itself. Hence, the federal question was not a substantial one, *i. e.,* it was not sufficient to sustain original suit in the District Court based thereon.

Section 80a-41, the enforcement provision of the Investment Company Act, makes clear that the Commission has the sole right to bring an action for violation of the Act. The same Section provides for investigations *by the Commission,* and obtaining a subpoena *by the Commission* from a court of law, in order to effectively carry out investigations. Section 80a-41, subsec. (e), similarly provides that *the Commission* may in its discretion bring an action in the proper District Court to enjoin violations of any provision of this Act and to enforce compliance with this Act.

Section 80a-43 of the Investment Company Act, with respect to jurisdiction of offenses and suits, provides that the District Courts of the United States shall have jurisdiction over violations of this Act concurrently with state

courts "of all suits in equity and actions at law brought to *enforce* any liability or duty created by, or to enjoin, any violation of" this Act. Since, as pointed out above, enforcement is entirely within the hands of the Commission, Section 80a-43 must likewise be taken to refer only to suits instituted by the Securities & Exchange Commission itself.

It is submitted that the clear intent of the Congress in enacting the Investment Company Act of 1940 was to confer primary jurisdiction upon the Securities and Exchange Commission. This is entirely consistent with the purpose of Congress in enacting other laws depending for their administration and enforcement upon expert administrative bodies, such as the National Labor Relations Act and the Interstate Commerce Act. The theory of primary jurisdiction was made extremely clear by the decision in *Amazon Cotton Mill Company* v. *Textile Workers Union*, 167 F. 2d 183 (C. C. A. 4, 1948). Another leading case recognizing the theory of primary jurisdiction is *Texas & Pacific Railway Co.* v. *American Tie & Timber Co.*, 234 U. S. 138 (1914), and cases there cited. As stated therein, the foundation upon which the doctrine of primary jurisdiction rests is the necessity of a uniform enforcement of the Act in question and the danger of diversity and conflict arising if questions concerning the proper interpretation of technical questions involved in the administration of subjects such as investment companies, tariffs under the Interstate Commerce Act, etc. are left to be originally determined by courts of general jurisdiction, thus giving rise to the possibility of one rule in one jurisdiction, and another in another.

Acts involving administrative bodies which specifically confer upon private individuals the right to bring separate actions in state or federal courts, of course do not fall within the principles just stated. Such an act is the Securities Exchange Act of 1934 (Title 15, U. S. C. A., Section 78). Sections 78r and 78t of that Act confer express rights upon individuals to sue for the violations of

the Act. See, also, the Securities Act of 1933 (15 U. S. C. A., 77a, ff. and 77k, 77l, 77o).

It is to be noted that in the case at bar *the District Judge was himself satisfied that no right of action was conferred upon an individual to sue in enforcement of the Act but that the Commission itself had the sole right* (Appellant's Appendix, p. 120a).

Taking any interpretation whatever of 28 U. S. C. A., Sections 1441 and 1447(c), it is clear that the case was removed "improvidently and without jurisdiction", since, at the time of removal, an individual not being entitled to bring an original action under the Investment Company Act of 1940, the District Court was without original jurisdiction. Without original jurisdiction in the District Court, there could be no removal to that Court either (28 U. S. C., Section 1441[b]).

It is clear, moreover, that reference to the Investment Company Act of 1940 was at most minor and incidental to the real question in the case which arose under Section 38(a) of Article 23 of the Code of Public General Laws of Maryland requiring meeting and vote by stockholders as a condition precedent of any sale, exchange or transfer of substantially all the assets of a corporation organized under its laws. In addition, all the grounds alleged of fraud on the stockholders were matters that would arise exclusively under state and not under federal law.

It is well recognized, of course, in this connection that it is not sufficient for removal purposes that there be *a* federal question, but it must also be a *substantial* one.

> *Ramapo Water Co.* v. *New York,* 236 U. S. 579 (1915).

See, also:

> *New Orleans Water Works Co.* v. *Louisiana,* 185 U. S. 336 (1902).

The above all establishes that in the absence of either diversity of citizenship or any substantial federal question to be determined by the Court in arriving at the substantive rights of the parties, the case was improvidently and improperly removed in the first instance, and this, by virtue of a proper construction and interpretation both of Section 1441(b) of the Judiciary Code and of Article III, Section 2, of the federal Constitution.

POINT II.

Upon filing of an amended bill of complaint, pursuant to leave granted by the United States District Court and before answer filed, eliminating every last trace and vestige of alleged federal question, substantial or otherwise, and in the absence of diversity of citizenship or other ground on which the federal jurisdiction could continue to attach, remand to the state court was mandatory and required. If 28 U. S. C. Section 1447(c) be construed otherwise, it is itself violative of Article III, Section 2, of the federal Constitution, in that it would authorize retention of a suit where there was no possible basis for the federal jurisdiction to continue to attach.

The Judicial Power of the United States under Article III, Section 2, of the Constitution, apart from cases involving such other considerations as diversity of citizenship, etc., extends:

> "to all Cases, in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made."

The District Court, by removing from the state court a case not involving a substantial federal question within the authorities, and where diversity of citizenship was not present, acted contrary to the provision in question de-

limiting the Judicial Power. The District Court thus assumed to take to itself by removal, a case not involving diversity of citizenship and one not arising under the Constitution or Laws of the United States, and of which it would not, therefore, have had original jurisdiction.

Whatever the situation with respect to federal question at the time of removal, however, upon filing of the amended bill of complaint pursuant to leave granted by the Court before answer filed eliminating every last trace of alleged federal question, nothing remained in the case as to which the Judicial Power of the Courts of the United States could continue to operate or perform its historic, governmental role.

Both the District Court and the Court of Appeals have assumed to hold that jurisdiction in the United States Courts continued by virtue of new 28 U. S. C., Section 1447(c), providing as follows:

> "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case."

Such construction of new Section 1447(c), it is submitted, is not warranted by any reasonable interpretation of the wording of that new section. The authorities prior to the new judiciary code sections did not permit removal, and required remand, on the facts here presented. New Sections 1441 and 1447(c) were not designed or intended to, and did not change the law in this regard.

The proper limits of the jurisdiction of the United States courts in removal and remand cases were set in the cases of *Solanics* v. *Republic Steel Corporation,* 34 F. Supp. 951 (Dist. Ct., N. D., Ohio, E. D. 1940), *Re Volland,*

83 F. (2d) 680 (C. C. A. 7, 1936), *Myerson* v. *Dentists' Supply Co. of New York,* 66 F. Supp. 31 (D. C. S. D. N. Y., 1946), aff'd 159 F (2) 681 (C. C. A. 2, 1947), and *French* v. *Jeffries,* 149 F. (2d) 555 (C. C. A. 7, 1945). See, also, *Green* v. *Custard,* 23 How. 484 (1859), and *W. G. Reardon Laboratories* v. *B. & B. Exterminators,* 3 F. Supp. 467, 473 (D. C. D. Md.), mod. o. g. 71 F. (2d) 515, where jurisdiction continued despite the dropping of the federal question, *but only because diversity of citizenship still remained in the case as the basis on which jurisdiction could continue to be predicated.* The new provisions of the Judiciary Code were not intended to negate the holdings of those cases, or if they were, they achieved thereby a result violative of the federal Constitution itself.

The Report of the House Committee on the Judiciary, as well as the Reviser's note specifically to new Section 1447 (c), may be searched in vain for any hint or indication whatever that any drastic, sweeping, and fundamentally anomalous and unconstitutional result as below upheld, was ever contemplated or intended. The Report of the House Committee says merely with reference to the new removal sections (p. 1697):

> "The procedure for removal of causes from State courts to Federal courts is greatly simplified. (See Secs. 1441-1450). Under existing law the removal petition must be filed with the State court which has no discretion to pass upon it but must forward the record to the Federal court. Revised section 1446 provides for the filing of the removal petition in the United States district court in the first instance, etc."

Similarly, the Reviser's note says merely with reference to new Section 1447 c (subsect. *e* before the change):

> "Subsection (e) is derived from sections 71 and 80 of title 28, U. S. C., 1940 ed. Such subsection is written to eliminate the cumbersome *procedure* of remand, etc." (Italics ours.)

This note speaks of changes of *procedure,* merely, not changes going to the whole scope of federal court jurisdiction and authority in our constitutional scheme.

The new Section 1447 (c), it is clear, therefore, was not intended to change in the slightest the rule which the *Solanics* and other cited cases illustrate, that where the federal question disappears by amendment of the pleading, and there is no diversity or other ground of federal jurisdiction remaining in the case, the federal jurisdiction must terminate.

POINT III.

If the removal and remand questions here presented were matters of discretion for the Court, rather than mandatory, the Courts below erred in wrongfully exercising their discretion to permit removal and refuse remand, respectively, on the facts here presented.

This point is self-explanatory. If the matter were one of discretion at all, there was a clear abuse of discretion on the facts at bar since the federal courts, without according the petitioner even his day in court in the way of a trial or hearing on the merits, have dismissed his suit where the matters involved were solely questions under state law.

Conclusion.

In the absence of a substantial federal question on which original jurisdiction in the District Court could be predicated, the case was improvidently and improperly removed in the first instance.

Whatever the situation at time of removal, however, upon later amendment of the bill of complaint, before answer filed, dropping every last vestige of claimed federal question, substantial or otherwise, and in the absence of diversity of citizenship or other basis on which the federal jurisdiction could continue to attach, the case should have been remanded. Section 1447(c) does not provide otherwise, but if interpreted so to do, that new section works an unconstitutional result.

If remand was properly refused as a matter of right, it should have been granted as a matter of discretion, there being no actual occasion or necessity for the federal court continuing to oust the state court of its jurisdiction in order to decide the questions remaining in the case which were, then, solely of state law.

The petition for certiorari should be granted.

Dated, New York, N. Y., August 24, 1950.

Respectfully submitted,

DAVID I. SHIVITZ,
Counsel for Petitioner.

EDMUND B. HENNEFELD,
Of Counsel.

Appendix A.

28 U. S. C., Sec. 1441:

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

28 U. S. C., Sec 1447 (c):

"If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk

of the State court. The State court may thereupon proceed with such case."

Constitution, Art. III, Sec. 2:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Appendix B.

(Opinion of Circuit Court.)

UNITED STATES COURT OF APPEALS,

For the Fourth Circuit.

No. 6029.

Arthur Brown, suing in his own behalf, etc.,
Appellant,

versus

Eastern States Corporation, a body corporate of the State of Maryland, and Officers and Directors: Floyd L. Carlisle, Jr., *et al.*,
Appellees.

Appeal From the United States District Court for the District of Maryland, at Baltimore.

(Argued March 6, 1950. Decided April 4, 1950.)

Before Parker, Soper and Dobie, Circuit Judges.

Eugene M. Feinblatt and David I. Shivitz (Simon E. Sobeloff and Edmund B. Hennefeld on brief) for Appellant, and Horace R. Lamb and George Cochran Doub (Marshall, Carey, Doub & Mundy, and LeBoeuf & Lamb on brief) for Appellees.

PARKER, Circuit Judge:

This is an appeal from an order denying an interlocutory injunction and dismissing a suit instituted by the holder of preferred and common stock of a corporation to enjoin the carrying out of a plan of corporate reorganization. The suit was instituted in a state court but was removed into the court below on the ground that it involved a federal question. The court declined to remand the case to the state court after the complaint had been amended to eliminate all reference to rights under federal statutes and, after an extended hearing, dissolved the temporary restraining order that had been issued by the state court and dismissed the suit as involving no question not decided in the denial of injunctive relief. See *Brown* v. *Eastern States Corporation et al.*, 86 F. Supp. 887. A motion was made by the appellee in this court to dismiss the appeal as moot and was heard along with the hearing of the appeal on the merits.

The litigation arises out of an attempted reorganization of the Eastern States Corporation which was and is the largest stockholder of the St. Regis Paper Company, holding 1,000,000 shares of the common stock of that corporation at the time the plan was inaugurated. Eastern is an investment corporation registered under the investment Company Act, its sole business being the holding of stock of other corporations. It had approximately 4,000 stockholders, who held 572,132 shares of non par common stock of a stated value of $1 per share, 40,000 shares of series A, $7 guaranteed dividend, preferred stock, and 60,000 shares of series B, $6 guaranteed dividend, preferred stock. The preferred stock had a liquidation preference of $10,000,000 plus accumulated dividends of $10,363,432, or a total of $20,363,432, which was entitled to payment ahead of common stock in case of liquidation.

The assets of the corporation consisted of $457,000 in cash and the 1,000,000 shares of stock in the St. Regis Paper Company, which had a value of $6.75 per share or a total value of $6,750,000. The debts amounted to only $16,354. Upon a liquidation of the corporation in ordinary course, the common stock would have received nothing and the preferred stock would have received an average of $72 per share from the assets, as against an average of around $203 per share for which the preferred stockholders had a preferential claim.

The plan was approved by the directors of the corporation but was not submitted to or passed upon by the stockholders. It was submitted in a letter of the president, dated August 30, 1949, to the preferred stockholders and was in the form of a statement that the corporation would exchange its assets for shares of preferred stock, which would be retired by the corporation and the capital stock reduced accordingly. The proposal was that for each share of the $7 dividend series A preferred stock the corporation would exchange 9 shares of St. Regis stock (value $60.75) plus $4.79 in cash, and for each share of the $6 dividend series B preferred stock 8-1/3 shares of St. Regis stock and $4.79 in cash, or an average of around $62.62 for each share of preferred stock. The plan pointed out that, assuming that all preferred stockholders accepted the plan, 860,000 shares of stock and practically all of the cash of the corporation would go to the preferred stockholders, leaving 140,000 shares of the St. Regis stock, or approximately 13% of the assets of Eastern, for the common stockholders. The plan stated that Mr. Ferguson, the president, who was shown in the "letter of plan" to own 5,925 shares of preferred stock, had indicated that he would not tender his stock for exchange under the plan and, at another place that "if less than all of the outstand-

ing shares of preferred stock are tendered for exchange, the liquidating value of unexchanged shares of preferred stock would be enhanced, and that the amount of the enhancement would increase in direct proportion to the number of shares of preferred stock that are tendered for exchange." It was nowhere specifically pointed out or suggested, however, that the effect of the other preferred stockholders exchanging their stock and Mr. Ferguson's not exchanging his would be to give him, as a preferred stockholder, a preference claim on practically all the assets of the corporation, leaving little or nothing for the common stock.

In justification of the provisions of the plan offering the preferred stockholders approximately $10 per share less than the asset value of their shares, there was evidence that the shares were selling for from 20% to 40% less than the underlying shares of St. Regis to which the shareholders would have been entitled upon liquidation of the corporation. This fact, however, would doubtless have caused most of the holders of preferred stock, if this litigation had not intervened, to have exchanged their shares as proposed by the plan, even though they were not to receive under it their fair pro-rata of the assets.

The plan provided that it must be accepted not later than September 30, 1949; and early in September plaintiff, an owner of preferred as well as common stock, instituted this suit in a Maryland state court alleging that the plan was unfair and fraudulent and violative of the corporation law of Maryland and of the provisions of the Federal Investment Company Act of 1940. An interlocutory injunction was obtained from the state court when the suit was filed; but the case was promptly removed into the federal court on the ground that a federal question was involved, and motions were made, by the defendant to dis-

solve the injunction, and by the plaintiff to remand the case to the state court. Pending the hearing of these motions, plaintiff was granted leave to amend and filed an amended complaint making no reference to any rights under federal statutes. The judge below refused to remand the case to the state court and dissolved the injunction on September 26, 1949, on the ground that the plan was not fraudulent or violative of the corporation law of Maryland. Between September 26 and September 30, there were 27,464 shares of preferred stock exchanged pursuant to the provisions of the plan. Following this, motion was made by defendants to dismiss the suit; and this motion was granted by the judge below on October 7, 1949, on the ground that all questions in the case had been decided in passing upon the motion to dissolve the injunction and that, the time for acceptance of the plan having elapsed, plaintiff had no further need of the injunction which he sought. An order of dismissal was accordingly entered.

Grave questions both of law and fact would be presented by the appeal, if plaintiff were in position to urge them. We do not mean by this to intimate any doubt as to the jurisdiction of the court or as to the correctness of the order denying the motion to remand. The original complaint unquestionably asserted that rights of plaintiff under federal statutes had been invaded; and this was sufficient to vest jurisdiction in the federal courts. 15 USCA 80 a-43; *Dechert* v. *Independence Shares Corp.*, 311 U. S. 282. Cf. *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, 207. The case was properly removable, therefore, to the federal court. 28 USC 1441(a). And the fact that plaintiff subsequently amended his complaint in an attempt to eliminate the federal question did not make remand proper. Under the provision of the old judicial code relating to

remand, 28 USCA 80, there was some conflict in the decisions;* but the revised code has used language which should remove all controversy and clearly establish the rule that the case is not to be remanded if it was properly removable upon the record as it stood at the time that the petition for removal was filed. 28 USC, 1950 Revised Edition, sec. 1447(c).

With respect to the charge that the plan was unfair, however, it is no sufficient answer that its acceptance was a voluntary matter on the part of the stockholder consenting to an exchange thereunder. The fact that the preferred shares of the corporation could be sold only at from 20 to 40 per cent less than the underlying shares of St. Regis would be a great inducement to stockholders to accept, whether it provided a fair division of assets or not; and it can be well argued that it was an abuse of power on the part of the directors to put out a plan the effect of which, if accepted by all the preferred stockholders except the president, would give them approximately $10 per share less than the asset value of their stock and would result in a gain to him of more than eight hundred thousand dollars. The president and directors occupied a fiduciary relationship toward the stockholders; and for them to put forward a plan under which the assets of the corporation would be used in the purchase of stock in a way which would so greatly profit one of their number, would be difficult to justify under any principles of law or equity with which we are familiar. See *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590, 599.

We think, also, that there was grave question as to whether the plan, not having been approved by the stock-

*Cf. Firscher v. Star Co. 227 F. 955, and Solanics v. Republic Steel Co. 34 F. Supp. 951, with Doland v. Hewitt Soap Co. 27 F. Supp. 482. And see discussion in St. Paul Mercury Indemnity Co. v. Red Cab Co. 303 U. S. 283, 293, 297, and Pullman Co. v. Jenkins 305 U. S. 534.

holders, was valid under the corporation law of Maryland. It involved, not an ordinary purchase of stock for redemption, as allowed by article 23, section 54(2), or an ordinary dealing by the corporation in its own stock, as provided for by article 23, section 54(8), but, if carried out as contemplated, a sale to its preferred stockholders of more than three-fourths of its assets and the retirement of 94% of its preferred stock, with a corresponding reduction of capital. It would have changed basically the nature and the holdings of the corporation; and the general rule is that such a basic change to be valid must have the approval of the stockholders in conformity with the statutes of the state of incorporation. See 13 Am. Jur. sec. 196 p. 315; 18 C. J. S. 747; note 44 A. L. R. 16. The sections of the Maryland Code authorizing the corporation to deal in its own stock or to purchase and retire shares subject to redemption, must be construed in the light of this well settled rule of corporation law, and cannot reasonably be given an interpretation which would validate a basic change in corporate structure without the consent of the stockholders. Particularly is this true in view of the provisions of section 32 of article 23 of the Code which requires the consent of stockholders to the reduction of capital stock and section 38 of article 23 which requires the approval of two-thirds of the stockholders where all or substantially all of the assets are sold, with provision for adequate protection of dissenting stockholders. Means which are legal may not be used to accomplish an end which is illegal.

We need not decide these question, however, since we do not think that the plaintiff is in a position to raise them. He has not been injured as a holder of either common or preferred stock by what has been done under the plan, nor has the corporation. On the contrary, his preferred stock has greater asset value and the corporation has greater

assets in proportion to its outstanding liabilities as a result of the exchanges that have taken place. The only persons who have suffered loss to date, as a result of the plan, are the stockholders who have accepted it and exchanged their stock; but they are not complaining and plaintiff is not authorized to speak for them and does not profess to do so. It is argued that the St. Regis stock held by Eastern had a special block value and that this would have been dissipated under the plan. The plan has ended, however, and more than 70% of Eastern's St. Regis stock is still held by Eastern, and, since this is far greater than the holding of any other stockholder of St. Regis, the special block value, if there be any, has not been dissipated. Furthermore, the breaking up of the block of St. Regis stock was expressly authorized by the stockholders at their meeting in April 1949, when they passed a resolution with regard to diversifying the holdings of the corporation. If the plan were still open to acceptance, plaintiff might be heard to speak in behalf of the corporate stockholders whose corporation was being radically changed without their consent; but the plan has expired under the time limitation which it prescribed, and it is clear that it cannot be extended since additional dividends on the preferred stock have accrued and other matters have occurred which render it impossible to carry out the plan as originally proposed. This we understand the proponents of the plan to concede. If it is still desired to go forward with an exchange of assets for preferred stock, it will be necessary that a new plan be devised and this may be submitted to the stockholders before attempt is made to put it into effect.

We are not impressed by the argument that the case is rendered moot merely by reason of the fact that the exchanges have taken place. If there were a party before the court who had suffered as the result of action which it

was sought to enjoin, we have no doubt of the power and duty of this court to afford him relief upon a finding that he was entitled to the injunction for which he had applied. Cf. *South Carolina Public Service Authority* v. *Securities and Exchange Commission,* 4 Cir. 170 F. 2d 948; Chicago Junction Case 264 U. S. 258, 267. Surely this court is not less able to grant relief when reviewing a court than when reviewing an administrative agency. Plaintiff has not suffered, however, as a result of proceedings heretofore had under the plan and is not in position to invoke the power of the court with regard thereto; and it does not appear from the record that any further action is contemplated. For this reason, the order of dismissal was proper. The order dismissing the case will accordingly be affirmed, without prejudice, however, to the right of plaintiff to apply again for relief if further attempt should be made to carry out the plan or another plan thought to be violative of his rights as a stockholder.

Affirmed.